United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1386

To Be Argued By
BENJAMIN J. GOLUB

DOCKET NO. 75-1386

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

ARTHUR G. SCHUFFMAN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the denial of the appellant's motion pursuant to Rule 15 failed the interests of justice and deprived the appellant of his right to adequately prepare for trial.

2. Whether judicial interference deprived the appellant of a fair trial.

3. Whether the appellant's conviction of 29 Counts of Mail Fraud is supported by sufficient evidence.

4. Whether the Court's instructions to the jury fairly reflected the appellant's theory of defense.

STATEMENT PURSUANT TO RULE 28 (a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York, (the Hon. Edward Weinfeld) entered on or about November 11, 1975,

after a trial before a jury, convicting appellant ARTHUR G. SCHUFFMAN of twenty-nine counts of mail fraud, in violation of 18 U.S.C. §1341. A sentence of two years was imposed upon appellant SCHUFFMAN, of which eighteen months are to be suspended with the requirement that the appellant be committed to a jail-type institution for a term of six months, followed by a parole period of eighteen months. Appellant SCHUFFMAN is currently free on a personal recognizance bond.

The District Court granted leave to appeal in forma pauperis.

STATEMENT OF FACTS

Appellant ARTHUR G. SCHUFFMAN, was indicted by a Federal grand jury on thirty counts of mail fraud, in violation of 18 U.S.C. §1341. Appellant was tried by a jury before the Hon. Edward Weinfeld on September 29th through October 6, 1975.

Prior to the filing of appellant's omnibus motion and attorney's supporting affidavit, (Filed June 27, 1975), the appellant sought leave to proceed in forma pauperis, (letter of Attorney Benjamin J. Golub, Filed July 26, 1975) which request was granted, permitting appellant to be defended by an attorney from the C.J.A. Panel (Report and Recommendation of Magistrate Schreiber, filed July 26, 1975).

The appellant's motions, including a request pursuant to Rule 15, Fed. R. Crim. Proc., (i) to depose potential witness, citizens of Great Britain, (ii) to retain an expert witness at government expense, and (iii) examine income tax returns of certain government witnesses, was heard and denied by Judge Weinfeld on July 22, 1975.

In denying on these motions the Court at oral argument stated:

> In the first place I should tell you I have very grave reservations that the magistrate came to the proper judgment in this case as to whether or not your client is really entitled to the benefits of the Criminal Justice Act..."

* * *

> The result of this was that you are being retained by the Government in effect. This whole case, including the charge and everything else has almost been steeped in fraud from the beginning to end."

This view was further expressed with respect to appellant's request that his attorney be permitted, at government expense,

travel expenses while visiting and interviewing goverment witnesses:

> Your request...sounds as if you are practicing law with one of the big Wall Street firms and ticking off hours by the day and adding up big expense accounts.

* * *

> I wrote this down and I wasn't going to raise it, I made a note on that and that is...one of the most amazing motions providing for a fishing expedition that has come to the Court's attention... Lawyers get into these cases and, as I said before apparently the Criminal Justice Act has become a happy hunting ground and more recently have never seen such outrageous requests for fees in some of these cases...

* * *

> It sounds like a junket to me, that you want t go to Scotland and England and I thought we have enough Congressmen doing that now.

These two branches of the motion were renewed on reargument (the motion for reargument filed August 5, 1975.) Reargument was heard on August 12, 1975 at which time the former was again denied while the latter was subsequently granted(granted September 8, 1975, "...in view of the fact that the government intends to call an expert.").

On the motion for reargument, trial counsel supplemented the Rule 15 motion to include an alternative request that he be permitted to engage, at government expense, a person to depose the witness in question, should the Court not permit him to travel to Britain himself.

The Court again questioned trial counsel's motivation for seeking such relief.

> I think you are quite removed from reality in this case in making the suggestions you did. I was not being facitious last time when I suggested that perhaps somebody is looking for a junket at Government expense, but if you represented this defendant on a private retainer, I have a grave reservation, with due respect to you, that you would be undertaking all these activities with respect to matters that are really not relevant...

* * *

> I wrote recently in a number of fee applications under the Criminal Justice Act that this act had been construed as a sort of hunting license on the part of lawyers to garner fees, and I don't understand it...

A further ruling at reargument related to trial counsel's request to examine income tax returns of government trial witnesses. The motion was denied with the following proviso:

> When they are on the witness stand, you can cross examine their income tax returns. It does not have anything to do with it. You cross examine them at that time.

A. THE TRIAL: THE GOVERNMENT'S CASE.

The Government alleged that appellant, as President and sole principal of Perthshire Scotch Whiskey, Ltd. (hereinafter, "Perthshire") devised a scheme whereby investors were defrauded into purchasing warehouse receipts for Scotch whiskey stored in the United Kingdom. (See Indictment.)

With the commencement of Perthshire's business in New York City in April, 1973, appellant performed the duties of signing the lease to the firm's premises at 386 Park Avenue South (580-582) [numbers in parentheses indicate trial transcript pages within which each witnesses' testimony appears in full] Witness James Rosbash (580-584); arranging for telephone service, Witness James Stafford (511-526); and opening two firm checking accounts at the Chase Manhattan Bank Witness Margaret Quinones (84-101). Appellant was thereafter present at Perthshire's office at irregular intervals (134, 136, 156, 158-60), Witness Barbara Antonucci (102-184).

Perthshire's customers were solicated through newspaper advertisements (450) (Witness T.R. Sanders (450-465) direct mailings (60) (Witness Marvel D. Lowe (59-81), and telephone calls (35) (Witness Lloyd Miller (278-290) and others. Literature explaining Scotch Whiskey investments contained coupons

which potential investors mailed to Perthshire to request additional information (278)(Among the possible investment gains suggested: 50% (Witness Marvel D. Lowe, (62-63); 25% (Witness Howard Douglas (188); 20-25% (Witness Luther Curtis, (220); 15-20% (Witness E.B. Newsome, (239); and 12-15% (Witness David McClain, 322). When Perthshire received such requests, it responded with Perthshire literature and telephone calls,(413)(Witness John White (412-450) and others).

The potential customers were offered a quantity of White Abbey Blend Scotch whiskey for investment purposes, generally at $6.80 a gallon, (413)(Witness John White supra. On at least one occasion a price of $7.60 a gallon was quoted (Witness Marvel D. Lowe (61). The caller, after identifying himself by name (SUCH NAMES ~~who~~ were identified through witnesses for the Government ~~:~~: John Gordon (Witness Marvel D. Lowe, 62-63); John Cook (Witness Luther Curtis, 219); Ray Richardson (Witness E.B. Newsome, 239); Mike Baxter(Witness Val Durham, 258) outlined investment potential in Scotch whiskey. On at least one occasion, Arthur G. Schuffman (Witness Robert L. Faris, 35).

Most of the investors [Many of the investors were professional and/or business people, for example, Witnesses Howard Douglas, supra, attorney; Val Durham, supra, purchasing agent; Loran M. Snow (338-361), veterinarian, Renold Marcon (363-395), life insurance salesman), Ruland E. Williams (396-412); Certified Public Accountant] declared their decision to

invest to be based on a combination of Perthshire's promotional materials and telephone calls from Perthshire Salesman (198, 234)(Witnesses Howard Douglas, supra and Luther Curtis, supra). Some relied almost exclusively on the phone calls (252, 290)(Witneses E.B. Newsome, supra and Lloyd Miller, supra). Some witnesses recalled suggestions that Perthshire would help dispose of their holdings when they were ready to sell and were positively influenced thereby. Others put stock in the fact that Perthshire maintained its bank account with the Chase Manhattan Bank (265, 328, 346)(Witnesses Val Durham, supra; David McClain, supra; and Loran M. Snow, supra).

Other investors also relied on various articles available in the general media, for example, the Wall Street Journal, Nation's Business and Changing Times, in which a "favorable" trend was perceived in Scotch whiskey investments (Witness Nicholas Mayer, ~~291-317~~ 313).

Many of these witnesses previously had other types of investments(Witness E.B. Newsome, supra 251) and did not consider their Perthshire holdings to be particularly substantial (386, 408)(Witnesses Renold Marcon supra; and Ruland E. Williams supra).

Among the literature distributed by Perthshire was a promotional pamphlet signed Michael McDaniel, Advertising

Manager (Government's Exhibit "3".) Some letters from Perthshire bore the name Thomas Patterson. (Of which Government's Exhibit "20" is an exemplor.) Most witnesses stated that they were not influenced in any way by these names.

Potential investors electing to purchase White Abbey Blend Scotch Whiskey, sent a check with a pre-encoded deposit slip to the Chase Manhattan Bank, made to the order of Perthshire (92) (Witness Margaret Quinones, supra). Deposit slips were conveyed to Perthshire by the bank, (121). Perthshire would then send a confirmation of the receipt of payment with a cover letter (Witnesses Loran M. Snow, supra; (343) Ruland E. Williams, supra (399; John White, supra (455; T.R. Sanders, supra). The cover letter was, on many occasions, signed by the appellant (342, 400, 416, 456). The letter contained specifications about the whiskey purchased, i.e., its age, exact number of gallons purchased and the place of storage. (323) (Witness David McClaim, supra).

Several investors purchased more than one lot of White Abbey Blend Scotch Whiskey (41,44, 60-61) (Witnesses Robert L. Faris and Marvel D. Lowe).

After each purchase, the investor also received correspondence relating to insurance and storage costs for their holdings which most paid. At least one declined to insure his investment (65).

On several occasions additional funds were requested of investors because, on the transfer of title, total gallons purchased exceeded those originally estimated, (64) Witness Marvel D. Lowe). In a few cases, refunds for overage in gallons were made by the appellant (338).

Internal office procedures at Perthshire were described by the company's two secretaries, Barbara Antonucci and Gloria Bjorkstrom (102-184; 537-577). Both women had previously been employed by a company called Dundas Bridge which, like Perthshire, was engaged in the business of selling Scotch warehouse receipts for investment purposes (104, 558)(Witness Antonucci suggested that Dundas Bridge had ceased operating because of S.E.C. problems 104).

Barbara Antonucci confirmed that Perthshire's office procedures were essentially, exactly the same as those at Dundas Bridge (143) and that while on one hand she was given office instructions by appellant only (108) Witness Antonucci also stated "I don't really recall what he said to me,"(108). Antonucci saw Messrs. Silver and Pepperman on a regular basis at the beginning of Perthshire's business and received business instructions from them (177).

In the course of her cross examination, witness Antonucci did not remember the name Isaac Silver (a former salesman at

Dundas Bridge (146) or remember the man himself (147); she had heard of Mr. Pepperman (another former salesman at Dundas Bridge (149) and stated that it was "possible" that these men spoke to her about obtaining employment at Perthshire (150). On further cross examination she admitted speaking to Silver and Pepperman on a frequent basis (171), being asked by the two if she had mailed out Perthshire 's documents and to whom (172-173); and considered it possible that she gave Silver and Pepperman phone numbers of people who called the Perthshire office (173). She additionally remembered calling the two men at a New York City telephone (173) and receiving instructions from them.

Barbara Antonucci's duties included sending out confirmation letters, advertising brochures (109) and other routine Perthshire correspondence.

Much of the Perthshire literature was preprinted, requiring only the typing in of the recipient's name and address (115)(for example, Gov. Ex. 10 (112); many of the letters, which were kept in stacks in the office (115) were already signed, either Michael McDaniel, Advertising Director (114), or Thomas Patterson, Director (117). Witness Antonucci never met or spoke to a Michael McDaniel (114) or Thomas Patterson (118) while working at Perthshire(nor did she, in her duties as bookkeeper, make payroll deductions or checks to either of these parties, 116, 118). Nor was she

familiar with the names of John Gordon, John Cook, Ray Richardson, Jim Tyler or Mike Baxter (135).

Barbara Antonucci stated that she did not recall certain Perthshire files being removed from the office in July, 1973 (126). Her recollection was refreshed, over defense counsel's objection, The court ruled on the objection pursuant to U.S. v. DeSISTO 329 F.2d 929 (2nd Cir. 1965) , with respect to her testimony in a prior proceeding before the State Attorney General (129) (Government Ex. 3502, pp. 25-26). The witness then testifed that the files, which were kept in an open, unlocked file cabinet were removed by appellant (129).

Witness Antonucci additionally testified that appellant signed confirmation letters bearing the initials GB:TP (Government Ex. 12, (120) and testified further that she did not recall ever hearing appellant talking on the Perthshire phone (Witness Antonucci was told to take messages and inform telephone callers that "someone would call them back, 136) or making customer telephone solicitations (163).

Gloria Bjorkstrom described the Perthshire office procedures, with respect to which she "received instructions" (562, 567). [This language is the Court's; the examination of Witness Bjorkstrom (and others noted elsewhere) was conducted by the Court at several junctures( )]. Her duties

did not differ from those she had performed at Dundas Bridge (558, 561). She did not recall meeting Ray Richardson, John Cook, Jim Tyler and other names identified by phone as Perthshire salesman (554), never met Michael McDaniel or Thomas Patterson while at Perthshire (546) and did not recall seeing Messrs. Silver and Pepperman at Perthshire (542). In the four to five months witness Bjorkstrom worked at Perthshire, she saw appellant approximately six to ten times (560).

During one of appellant's many absences from New York, in late July and early August, 1973, three rooms were registered under his name at a Holiday Inn located in Canoga Park, California (Witness Douglas King, Holiday Inn accountant, 527-537, 531). According to a motel housekeeper's report he was accompanied by two other adults (531); nothing in Holiday Inn business records indicate that appellant actually spent any time there (537).

Both secretaries were discharged from Perthshire in September, 1973 (544) because the business was closing (557). Phones were disconnected at the Perthshire office soon afterward (516), as well as at 1701 York Avenue, where appellant was the subscriber to three telephone numbers (525). On October 19, 1973, the manager of 386 Park Avenue South wrote to the landlord, indicating that the Perthshire tenants had moved out, advising that security be applied to rent (583). Office articles were left behind when Perthshire

vacated the premises (586).

It was also about this time or soon thereafter that a number of Perthshire investors were unable to reach Perthshire by phone or mail (Witness Marvel D. Lowe, 68); Witness Howard Douglas reached an answering service, 194); Luther Curtis 224); Nicholas Mayer 300). Not having reached Perthshire, numerous investors sold or attempted to sell their holdings. A review of such sales, among other data, was set forth in charts prepared for the jury and presented by Postal Inspector John Slavinksi, indicating losses incurred by the various investors (695-709). (Government's Exhibits "280"). The Court overruled defense counsel's objections that charts were repetitive and created an undue cumulative effect (696).

Perthshire acquired White Abbey, (a blended Scotch whiskey) for sale to investors from Henry Ost & Sons, a London whiskey broker (558). Witness Maurine Quinn, one of the witness whom appellant had sought to depose before trial (558-623), was secretary to Henry Ost from 1954 until his death in 1973 (558) and testified that Ost & Sons generally charged Perthshire 95 pence ($2.16) a gallon for White Abbey whiskey less 5 pence for the barrel (594) [On occasion, the price was 85 pence ($1.92 per gallon) less 5 pence for the barrel].

According to witness Quinn, a "Mr. Schuffman" telephoned Ost on behalf of Perthshire in 1973 to inquire about purchasing blended Scotch whiskey (589). Witness Quinn described White Abbey as a house blend (591), of a "virtually inexhaustible" supply (594) "commercial" (608), commanding "no premium" (594), sold in bulk only to Perthshire (609). Ost also sold bottled White Abbey, in Australia, France and elsewhere, at £ 3.50 per dozen bottles ($.70 per bottle) (610-611, 620).

Witness Quinn additionally stated that a "Mr. Schuffman" had visited the Ost office in August or September 1973 (595) in the company of a Mr. Blake (596), and identified appellant in Court by name (595). Appellant's passport, however, bore no visas indicating visits to London or elsewhere (596).

Defense counsel's examination of witness Quinn was curtailed by the Court (619) with respect to questions concerning Henry Ost's honesty or lack thereof on grounds of relevancy (620). (See also (601), comments by Court.)

John B. Thorne, former manager of Chivas Brothers division of Seagrams, testified as an expert witness for the government (624-694). He explained that Scotch blenders prefer to buy malts and grains separately (630), rather than purchase preblended Scotch whiskey (628), because, among other reasons, each blender wants to maintain his own proprietory blend (672).

Commenting upon information distributed by Perthshire, (Defendant's Exhibit "C"), witness Thorne gave a generally negative view of its substance,("It is not true as a general proposition that Scotch Whiskey appreciates in value as it ages." (636); Investing in Scotch is not a "low - risk high-profit opportunity" (637); See Thorne testimony generally, and Defendant's exhibits J-O.

The practicability of investing in small lots was denied by Thorne(because smaller lots are harder to dispose of and the cost of transportation, freight and storage is proportionally higher (633); he also stated that the Scotch market had been generally depressed for the last five years (634). With respect to Perthshire's suggested increase of 38% in value over a 2-4 year period, Thorne stated "There is no basis for it. You could be optimistic, but there was no basis for it that I could see," (693-642). Witness Thorne testified that the price for a preblended Scotch whiskey in 1973 was from $1.25 to $1.50 per gallon (641).

In reviewing a series of defense exhibits, articles in newspapers and popular magazines about Scotch whiskey investing, Thorne generally disaffirmed their claims (643-680) as "inaccurate", (656, 658, 662, 665, et seq.)

B. THE DEFENDANT'S CASE

Appellant, a 55 year old traveling salesman with no prior criminal record (appellant was honorably discharged from the United States Marine Corps), testified on his own behalf at trial (853-972).

Appellant recalled his first introduction to Isaac Silver and Ronald Pepperman in March 1, 1973 (856-7) and their invitation to join them in a new business venture, selling Scotch whiskey to American investors (857).

A resident of California (858), appellant discussed the prospect with his wife who then, like appellant, was satisfied with her own employment situation. (825) Government rebuttal witness Armand Cash testified that appellent told him that he was going East to "promote eyelashes" (1019)).

They decided that they would retain their California residence until they could determine the success of the venture (825).

Appellant had no experience whatsoever in the whiskey business (855) but was told by Silver and Pepperman that they had been selling Scotch in New York City and were "doing well" (857).

By the time appellant arrived in New York in early April, 1973 (860), Isaac Silver, with the assistance of his attorney, had already received authorization from Albany to use the name "Perthshire" for the new concern (862).

It was appellant's understanding that the attorney was looking into more than just the SEC aspects (881). "I felt going into the business was a big step, and I wanted to do it right..." (882).

Appellant soon signed a lease for an apartment at 1701 York Avenue (882), opened Perthshire's accounts at the Chase Manhattan Bank, (giving his California bank as a reference) (884-885), and before returning to California on April 26, 1973 (888), was introduced to Barbara Antonucci, formerly a secretary at Dundas Bridge, whom Silver, appellant believed, had contacted to work at Perthshire.

Barbara Antonucci knew how to perform the office duties, and she never asked for instructions, (887), and appellant gave her no instructions beyond what her office hours would be (886).

Appellant returned to California on April 26, 1973 and remained there, recuperating from extensive oral surgery performed on April 27th until May 29th. (808) During that period he spoke to Isaac Silver but did not himself conduct any Perthshire business. (890).

Appellant returned to New York on May 29th and remained until June 22nd (891). He stayed at 1701 York Avenue with Silver and Pepperman (who were also California residents (858), and routinely attended to matters concerning Perthshire's business (892). While appellant was at the office, Silver and Pepperman were at the York Avenue address, "handling the

sales end of the business" (893).

~~On cross-examination~~ Appellant declared that he "~~never~~ didn't pay any attention" to Silver and Pepperman's calls to Perthshire customers when he was present in the apartment (926).

Appellant testified that he never called a Perthsire customer (893) in fact, avoided the phone at Perthshire's office because phone work was not in his province (941-942) [Appellant similarly denied overhearing either Silver or Pepperman making claims for a 40-50% increase on customer's Scotch shiskey holdings (927-928) or conversations concerning the origin of the whiskey. (929).]

Appellant testified that Silver and Pepperman did all the phone work at Perthshire, appellant relying on "their knowledge of the industry" (894) and his absence of reason to doubt that they would be involved in "anything" but an honest and truthful venture (894) [Other than what Silver and Pepperman told appellant, he had no knowledge of the price of Scotch whiskey (894).]

On June 22, 1973 (appellant testified to all dates on which he travelled to and from California with the aid of airline tickets he had saved; ~~and~~ he retained these records "out of force of habit" acquired as a salesman(901). Appellant returned to California because his wife was undergoing serious surgery (895)not returning to New York until July 16th (895). During that period in California appellant

remained with his recuperating wife, made no solicitation calls to Perthshire customers, further asserting that he never called any of the individuals who testified for the Government at trial. (896).

Once returned to New York, appellant again sought the attorney's advice with respect to subpoenas which had been served upon him, Barbara Antonucci, Gloria Bjorkstrom, and Perthshire by the State Attorney General (897). [The attorney testified that his concern about the Attorney General's investigation rested primarily on the issue of possible SEC violations (743)]. He received the attorney's assurance that "everything was all right," that Perthshire was not in violation of law and could continue in business. The attorney, appellant testified, never told him that Perthshire was being investigated for fraud (899). [The attorney, when examined by Government counsel upon Government Exhibit "405" did not recall showing appellant a set of legal papers in which some of Perthshire's promotional materials were characterized by the Attorney General's office as "atrocious literature"]. (770)

Appellant testifed that he never removed files from Perthshire's office (appellant's wife testified that she did not recall ever seeing business papers at home, (825) nor instructed any other person to remove them (902, 938).

Perthire's attorney later testified that Barbara Antonucci had told the State Attorney General that certain files had been removed from the office "but that she didn't know who took them away "(794).

In late July and early August appellant signed the register for a rental of three rooms at the Holiday Inn in Canoga Park, California, several miles from his home in Reseda, California (904). These premises were used by Silver and Pepperman as well as salesman Galperin and Gordon (986) in connection with Perthshire's business (appellant had told Silver he wanted to remain in California during his wife's recuperative period (902) and after discussing the problem of the subpoenas and attorneys advice, it was decided to temporarily set up operations in California (903) while maintaining the principal Perthshire office in New York, where appellant spent very little time (904). Other premises were also taken nearby, shortly afterward, which were used by Silver, Pepperman, and two part-time salesmen hired by them (904 -905).

In late September appellant again spoke with the attorney who informed him about "some kind of decision" which now meant that Perthshire was operating in violation of SEC regulations (905). The attorney told appellant Perthshire could either go out of business or take the case to Supreme Court (906) The attorney stated that it would cost a minimum of $10,000 to "fight" the case (906-907).

Appellant, in discussion with Silver and Pepperman, indicated that in his opinion, in view of the ruling the attorney had mentioned, Perthshire should cease to continue doing business (907).

In October, 1973 at the attorney's office, appellant signed a certifcate of dissolution for Perthshire (910) (Government's Exhibit "2".) He hired an answering service to take Perthshire phone calls (911), obtained a Post Office box in California to handle Perthshire mail to be forwarded (911) (the latter suggested by Defendant's Exhibit AM for identification, which the Court declined to permit in evidence (912) and because he was rushed about returning to California to begin a new job, left the office furniture at the Perthshire office for "any tenant who wanted it" (937).

When asked on cross-examination if he ever attempted to reach Perthshire investors after October, 1973, appellant testifed, "...the corporation was dissolved and I had no authority to act..." (969).

Appellant testified that his entire share of financial benefits in Perthshire's business consisted of approximately $6,000.00.This figure represented approximately one-third of the commissions paid by Perthshire; the other two-thirds were paid, appellant testified, to Silver and Pepperman in cash (916) for which

he had no record (940).) Appellant stated that he reported the full amount of commissions on his personal income tax return and was reimbursed for their respective tax shares by Silver and Pepperman (917). This arrangement was followed, as was the practice of having only appellant's name on Perthshire documents, because Silver and Pepperman had agreed with a former partner not to compete in the area of Scotch whiskey investments (1010).

Morris Rosenbaum, a former Internal Revenue Service agent, and the accountant who prepared the Perthshire tax returns for 1973, testified that Perthshire showed no profit for that taxable year (841).The particulars of the records from which the returns were prepared (Rosenbaum testified he would not have prepared them if he believed them to be "incorrect", 840) are set forth in detail in his testimony (826-846).

On cross-examination appellant testified that the names John Cook, John Gordon, Ray Richardson, Mike Baxter, and Thomas Patterson were fictitious (948-950) that appellant himself had no expertise in the Scotch whiskey trade (950), and that while he knew that Silver and Pepperman also were not experts (951), that appellant relied on Henry Ost for expertise (954). Appellant further testified that he had never travelled to London (908) nor had a duplicate passport issued (909).

In placing reliance on the attorney, appellant stated that his attorney knew that appellant had no experience in the business and that the attorney had previously known Silver and Pepperman (961).

Appellant also stated that Michael McDaniel did not exist and that appellant never told anyone he did. The accuracy of this statement was contested by Government Witness William R. Raikin (974-981) who testified that when he asked for McDaniel at the Perthshire office appellant relied "he no longer works here"(974). Raikin inquired about McDaniel's whereabouts in the course of serving Attorney General's subpoenas at Perthshire and during a conversation, with appellant, Barbara Antonucci, and Gloria Bjorkstrom lasting approximately 20 minutes. Raikin did not remember anything else that was said (978).

Additional reliance, appellant testified, was placed on his own readings about the Scotch whiskey industry, which indicated that Scotch selling for $2.00 per gallon would become worth $8.00 - $9.00 per gallon in one to two years. (956).

In response to cross-examination upon a variety of newspaper and magazine articles reflecting unfavorably upon Scotch investments (~~Government~~ in Defendant's Exhibits) appellant testified that he had not seen those articles (966-968). Appellant did

recall seeing unfavorable reports in defendant's Exhibits.

The Court permitted a reopening of the Government's cross-examination of appellant for inquiry regarding telephone calls placed from Reseda, California to a Victor Sherlock (appellant stated he had never heard of a Victor Sherlock but one Perthshire salesman was known to him as Vic Gordon) in Canada and to Barbara Antonucci in Queens, New York (991, 994), and from Reseda to numbersin Montana, Nebraska and elsewhere (995). Appellant testified that he did not place these calls and that the additional office space rented by him was in Tarzana, California not Reseda (990). Reseda, California was appellant's residence.

Defense counsel at the sidebar requested a continuance to establish whether calls placed from Tarzana, California were, according to phone billing procedures billed to Reseda, California (1013). Appellant testified that he did not believe "there is a Tarzana billing for the phone company"(1014). In the alternative, he asked that counsel for the Government/inquire to (1015). The Court denied Counsel's request (1016).

Deborah Schuffman, appellant's wife, testified regarding her husband's oral surgery on April 27, 1973 (806) and to her own surgery on June 26, 1973 (810). During her period of

hospitalization and recuperation at home she stated that appellant, except for purchasing food and other necessaries (824) remained with her almost continually (812, 824). Witness Deborah Schuffman indicated that she was under sedation and slept for periods of time during her convalescence (812), that she nevertheless, felt appellant's presence. She did not hear appellant make phone calls of a business nature from home (813). She stated that if the Perthshire business went well, she and her husband planned to move to New York (825).

The attorney, Andrew Gore, testified for appellant under subpoena (714). He had represented appellant, Barbara Antonucci and Gloria Bjorkstrom at proceedinsg before the New York State Attorney General's office (778, 793). Gore further testified that he did not believe the subject of the investigation to be "fraudulent advertising" (768).

Gore stated that the issue of mail fraud was not discussed with appellant (740) and that in reviewing newspapers and magazines article he was "not aware of whether [they] were being sent or not being sent" (745). Gore also testified that his only knowledge of whiskey came from the materials shown him (744).

On cross-examination Gore testified over objection that appellant never told him that Perthshire would not have an

advertising director, nor, that the company would operate with three employees in a room on Park Avenue South (748), nor that telephone calls would be made by people using false names (748) Additionally, facts which Gore stated he was not told are set forth in the trial record (749-750).

During cross-examination defense counsel objected to this line of questioning because it had not been established whether appellant ever asked for such advice, which Gore testified he never gave appellant because appellant never asked him . The Court ruled that defense counsel could so inquire during cross-examination. [Sic.]

During this examination the Court interrupted to give the following instruction, over defense objection, to the jury:

> This is an instruction I will repeat again in this course of my formal instructions. You remember at the start of the trial, before a single word of testimony was heard, that I suggested you not only listen to what witnesses said, but also you observe their manner and conduct in testifying their demeanor. Eventually when you are called upon to pass upon the credibility of witnesses -- this applies to all witnesses -- the circumstances under which he testified, the manner of testifying, may be considered by you in passing upon his credibility. (786-787)

C. THE CHARGE

Defendant's counsel submitted substantial requests for charges to the jury (Defendant's Requests for Charges were submitted to Weinfeld, J. on or about October 2, 1975), and defense counsel's objections to the Judges charges appear at page 1154. The Court's charge is contained at pages 1119-1154. The particulars of the charge are discussed at length in the argument.

ARGUMENT

POINT I

THE DENIAL OF APPELLANT'S MOTION PURSUANT TO RULE 15 FAILED TO SERVE THE INTERESTS OF JUSTICE AND DEPRIVED APPELLANT OF HIS RIGHT TO ADEQUATELY PREPARE FOR TRIAL

The facts alleged in appellant's motion pursuant to Rule 15 were sufficient as a matter of law to compel a granting of the motion. Appellant set forth in tolerably concrete terms the testimony he hoped to elicit from the then potential witness. (See transcript of hearing on the motion, July 22, 1975); and it was correctly stated in counsel's affidavit that there is no requirement under the Rule that the testimony sought will surely exonerate him, (See defendant's Affidavits and Memorandum of Law filed July 24, 1975, August 5, 1975 and August 6, 1975, respectively).

> "The Rule imposes no requirement that the defendant show the expected testimony will surely acquit him. It requires him to make it "appear" - sufficient to conduct a favorable exercise of the Court's discretion - that the anticipated testimony is "material" It requires a reasoned basis for expecting that the testimony may exonerate him.

This view is also supported by United States v. Hagedorn, 253 F.Supp. 969 (S.D.N.Y. 1966).

Somewhat akin to the witness in Hagedorn, supra, witness Quinn enjoyed a "cooperative relationship" with the Government; such a relationship cannot per se rule out the

possibility that such a witness may have testimony material to the presentation of a defense case. Counsel for the government in Hagedorn supra, declined to affirm or deny its intention of calling the witness Beaver to testify at trial. In the case at bar, government counsel declined to so predict and stood behind a thin veil of opposition to the motion charging the defendant was attempting to engage in forbidden discovery.

Appellant's showing on the motion was "in terms of his hoped for exoneration" which "is not defeated by even a highly plausible forecast that the hope will be shattered in the event," Hagedorn, supra 253 F.Supp. at 971. Such hope was ultimately shattered for appellant but the standard used by this court should not be one of what ultimately came to pass at trial. Appellant's belief before trial, that Quinn had testimony materially helpful to him should control.

This Court should also consider the atmosphere in which appellant's motion was denied. The presiding Judge seemed unwilling or unable to abate his criticisms of the defense case and the circumstances under which he believed appellant had incorrectly been provided C.J.A. counsel. The Court filled the record with what should have been extraneous references to Wall Street lawyers and junkets at the government's expense.

It appears however that such references were not extraneous in guiding the Court in making its decision. Although amended subsections (a) and (c) of Rule 15 was not in effect at the time of trial, this court should be guided by the policy considerations set forth therein.

Subsection (a) provides that the government as well as a defendent may depose a witness before trial. The benefits of the new rule to government counsel are predictable. The government will be able, as now, to privately interview potential witnesses before trial, determine if the witness's testimony will be helpful to the government, then move, if such is the case, to depose them as prosecution witnesses. Such a motion on the part of the government will likely earmark a witness as a government witness early in the proceedings, thereby removing the possibility of such deposition by the defendant. As the new rule states, "a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses." Defendants will be potentially prejudiced by this rule because of the enormous resources in terms of time, money and legwork at the disposal of the government.

It is suggested that such has conceivably been the situation in the case at bar. Defense counsel stated and the Government's attorney did not refute that witness Quinn had earlier been examined by Government investigators.

The denial of the motion in this case was particularly disastrous for it paved the way to an in-court identification based on a very possibly tainted prior photographic identification of the appellant by Witness Quinn upon which the trial court not only disallowed defense counsel cross-examination, but ignored what should have been the Court's duty, to suggest an immediate hearing within the trial pursuant to U.S. v. Wade, (1969) 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926.

The policy underlying new subsection (c) of Rule 15 should also guide this Court. Congress has seen fit to safeguard indigent defendants under the new section. In such cases "the expenses of taking the deposition must be paid by the government." See, Notes of Committee on the Judiciary, House Report No. 94-247 . The trial court's opinions concerning appellant's eligibility for treatment in forma pauperis should not have been relevant to its ruling on the motion. The thorough going distaste of the trial court for the fee requests of C.J.A. cases recently before him stated by his disbelief in the defendant's cause, ("This case has been almost steeped in fraud from the beginning ") apparently clearly placed a large role in its decision - making process regarding this motion.

The cases the Court fleetingly referred to in denying the motion do not support such a ruling. The decisive aspects in U.S. v. Whiting, 308 F.2d 537, ~~(2d Cir. 1962)~~, were the cert. den. sub nom. Crowe v. U.S., 372 U.S. 909, 83 S. Ct. 722, 9L Ed. 2d 718 (1963).

tardiness of the motion ("20 minutes after three on the opening day of trial," 308 F.2d at 541-42) and the apparent fact that the defendant therein had concealed certain information for a period of two months, 308 F.2d at 541.

In U.S. v. Steel, 359 F.2d 381 (2d Cir. 1966 Weinfeld, J.) this Court found that the appellant's request to depose Bolivian nationals contained "no showing that this testimony might have been relevant," endorsing the trial court's finding that "the appellants assertions were fantastic..." (359 F.2d at 382).(At least the Court found appellant's showing within only "amazing".)

In the case at bar, appellant's showing, while not ironclad, provided a suitable basis of relevancy.

The allegation of an appellant asserting no prior knowledge of the witness sought to be deposed, a denial of every having met the witness, and an assertion that such witness, if questioned, would say he had never met me, has been held sufficient basis for the granting of a Rule 15 motion, U.S. v. Egorov,

34 F.R.D.130 (E.D.N.Y. 1963). Where a Court is in doubt as to the exculpatory nature of the testimony of a witness sought to be deposed, the "wiser course" is to allow "[t]he jury...to weigh such testimony..." U.S. v. Gonzalez, 488 F.2d 833 (2d Cir.1973).

Had the government been more cooperative, the procedure suggested by Judge Tenney in U.S. v. Bronston, 321 F.Supp. 1269 (2d Cir.1971) might have been followed, arranging for the "taking of the depositions when government counsel was in [London] himself interviewing witnesses." (The testimony sought there went to the background "against which " the defendant formed his belief..." 321 F.Supp. at 273).

Moreover, since the "scotch whiskey" market and prices charged thereon are made, by definition, almost exclusively in Scotland and England, and since this case involved whether or not the price charged was "fair" it was incumbent upon the Court to allow defendant's counsel the same opportunity that the government had, namely to get to the source - the scotch whiskey market - to find, interview and depose witnesses with a view towards establishing a defense, based upon the realities of the scotch whiskey market which defendant was unable to discover. For all this court knows, the prices charged were, in fact, fair and reasonable. The fact that

this discovery would have been at government expense is irrelevant. The vacillation contained in the testimony of the government's expert and the numerous articles introduced into evidence which contradicted his testimony, indicate that such discovery was crucial to the preparation of a defense, and the failure to allow discovery constitutes reversible error.

POINT II

APPELLANT'S CONVICTION IS UNSUPPORTED BY SUFFICIENT EVIDENCE APPELLANT'S RULE 29 MOTION SHOULD HAVE BEEN GRANTED

The evidence adduced at trial does not support appellant's conviction or a finding by which "a reasonable mind might fairly conclude guilt beyond a reasonable doubt." U.S. v. Frank, 494 F.2d 145 (2d Cir. 1974).

At the very outset, this Court should view the evidence within the context of the common sense, every-day world of commerce.

"The Court cannot dwell in their ivory towers without descending occasionaly into the market place...", U.S.v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970).

The alleged scheme to defraud must be analyzed with reference to the expectations of investors as well as to the nature of the item being purchased.

Many of the Government witnesses declared that investing in Scotch shiskey was essentially just another investment in their portfolios. Most admitted that they fully understood that an investment in Scotch whiskey could decrease as well as increase in value, thereby establishing that they were not unsophisticated individuals, of whom unfair advantage was being taken. Van Reper v. U.S., 13 F.2d 961 (2d Cir. 1926). As the record fully indicates the Perthshire investors were not "...game enticed into the trap..."

[U.S. v. Rowe, 56 F.2d 747 (2d Cir. 1932)], but persons of above average intelligence and experience, as evidenced by their various professional and business callings.

This court may elect to take guidance from the standard that a scheme that is "reasonably calculated to deceive persons of ordinary prudence and comprehension," [Blachly v. U.S., 380 F.2d 665 (5th Cir. 1965); U.S. v. Shavin, 287 F.2d 647 (7th Cir. 1961); Silverman v. U.S., 213 F.2d 405 (5th Cir. 1954)], but should not endorse the tautologies expressed in U.S. v. Bush, 522 F.2d 641 (7th. Cir. 1975).

Bush appears to establish a sliding scale in which the relative sophistication of the alleged scheme renders any potential victem a member of a class of persons of such "ordinary prudence and comprehension." If this Court choose to approve such a view, it must concomitantly adopt a higher standard of proof tending to show intent.

Similarly, cases in which representations are made with respect to standardized items in commerce must be distinguished from purchases which are clearly, as here, for investment purposes. See U.S. v. Hanningan, 303 F. Supp. 750 (D.C. Conn. 1969; U.S. v. Farmer, 218 F.929 (2d Cir. 1914) and U.S. v. Kyle, 257 F.2d 559, ~~(2d Cir.)~~ cert den. 79 S Ct. 312, 358 U.S. 927, 3L Ed. 2d 301 (1958).

Even assuming that Government made an adequate showing of a fradulent scheme to deceive Perthshire investors, insufficient evidence was adduced to show appellant's knowing and intentional participation in such a scheme. Scrutiny must accordingly be given to the nature and extent of knowledge to be reasonably expected on the part of the appellant. Appellant lacked expertise in the area of Scotch wiskey investments (Cf. U.S. v. Eskow, 422 F.2d 1060, cert. den 90 S.Ct 2174, ~~1065~~ 398 US 959, 26 L Ed 2d 544 ~~(2d Cir.~~), (1970); U.S. v. Mortimer, 118 F.2d 266, cert den 62 S.Ct 58, 314 US 616, 86 L Ed 496 ~~(2d Cir.~~) (1941); U.S. v. Kyle, supra). As a person undertaking a subsidiary role in the running of a new business whose ability to make good its claims had not yet been borne out by "practical experience" (U.S. v. Baren, 305 F.2d 527 (2d Cir. 1962), appellant's failure to recognize an allegedly fraudulent scheme cannot be said to be supported by sufficient evidence.

Statements of fact must also be distinguished from statements of opinion. "Investments", by their intrinsic nature, represent to even persons of "ordinary prudence and comprehension", a clear notion of fluctuating value not susceptible to determinative description. Even with respect to standarized non-investment items "[w]e must...examine the government's theory that fraud may exist in a commercial transaction even where the customer gets exactly what he expected and at the price

he expected to pay." U.S. v. Regent Office Supply Co., supra, 421 F.2d at 1180. Perthshire investors intended to and did purchase Scotch whiskey, with the understanding that it was for investment purposes.

Note should be made that while the Court indicated on the hearing of the pretrial motions that counsel would be permitted to cross-examine Government witnesses with respect to capital gains losses enjoyed by them, the court declined to permit such examination at trial (55).

Dealing with Scotch whiskey for investment purposes, SCHUFFMAN could reasonably expect investors to "use [their] own wits." (U.S. v. Rowe, supra, 56 F.2d at 749). Even an admitted"...intent to deceive,...to induce...does not, without more, constitute 'fraudulent intent' required by the statute." U.S. v. Regent Office Supply Co., supra, 421 F.2d at 1181.

Much of the testimony relating to appellant's involvement furthermore, was admitted into evidence through the declarations of other persons, presumably Silver and Pepperman. The reception of such evidece in effect forced appellant to defend against unspoken but nevertheless palpable charges of conspiracy, without the evidentiary benefits which would normally be accorded a defendant in a conspiracy case.

Appellant's Rule 29 motion to dismiss at the close of the Government's case should have been granted. There was no credible evidence that appellant had ever made a single telephone call to any investor. Only two witnesses said that a man using the name of appellant had called and they were unable, obviously, to testify that it was, in fact, the appellant. No one testified that they had seen appellant make a call.

A careful reading of the record of the numerous investor-witnesses fails to reveal a single one who made a purchase only based upon the literature mailed, and the expert testimony, when carefully reviewed, reveals only several minor mis-statements that were involved in the literature, in any event. Certainly, not enough to meet a standard of criminal fraud. In view of the fact that there was no proof that the appellant had prepared any of the literature or made any calls pursuant to a "scheme" to defraud the appellant's motion should have been granted. The only thing the government did prove was that the witness-investors lost substantial amounts of money. This, of course, was highly inflammatory to the jury. However, all the testimony when reviewed through the practiced eye of this Court should reveal that there was absolutely no showing either by direct or circumstantial evidence of "devising" or "participating" in any scheme to defraud by this appellant.

At best, a certain amount of "puffing" took place. If every broker who ever puffed a stock to an investor who subsequently lost money in the investment was prosecuted for mail fraud the Courts could handle little other work. The salesman in this case gave "opinion" only. The investors-witnesses acknowledged that they realized the price could go downward that they were being given a "sales pitch." No investor testified that a salesman guaranteed the price.

POINT III

JUDICIAL INTERFERENCE DEPRIVED APPELLANT OF A FAIR TRIAL

During the course of appellant's trial the judge saw fit to interupt the proceedings on numerous occasions. While it is a "...long standing tradition that a federal judge is more than a passive referee and has a positive reponsibility for the management of a trial, including clarifying the issues as he sees them," / New England Enterprises, Inc. v. U.S., 400 F.2d 58, cert. den. 89 S. Ct. 654, 393/ U.S. 1036, 21 L.Ed. 2d 581 (1968), the frequency with which the Court interfered in the trial exceed proper limits.

In counsel's attempt to impeach certain witneses with prior statements (p. 267, 268), the Court sustained Government objections and admonished defense counsel, "You are not an issue in this case. Now please, won't you question the witness with respect to relevant matters."(p. 269).

The interposition of the court's charge within the trial regarding the testimony of witness Andrew Gore and remarks directly addressed to Gore by the Court were improper and substantially damaging to appellant in that they had the effect of improperly suggesting to the jury that the Court doubted the witness. During witness Gore's testimony the Court saw fit to reinstruct the jury "You remember at the start of the trial, before a single word of testimony was heard,

that I suggested you not only listen to what witnesses said, but also you observe their manner and conduct in testifying, their demeanor. Eventually when you are called upon to pass upon the credibility of witnesses - this applies to all witnesses - the circumstances under which he testified, the manner of testifying, may be considered by you in passing upon his credibility."(p. 786, 787). The court's attitude towards witness Gore was not one of impartiality (p. 718, 740, 761, 762). "While the judge has an active role to play in the search for truth through the trial process, he must take great pains to avoid giving the jury an impression that he is partisan." U.S. v. Persico, 305 F. 2d 534 (2nd Cir. 1962) and ~~supra~~; U.S. v. DeSisto, 329 F. 2d. 929 (2nd Cir. 1964) ~~289 F.2d 833 (2d Cir. 1961)~~.

The Court's ruling that appellant's counsel could make certain inquiries of the appellant's own witness Gore on cross-examination ironically indicated the Court's intent. (See p. 761, supra). Appellant's defense in great part was predicated in his good faith reliance on advice of counsel. ~~By~~ The Court's re-emphasis of its charge, at that point clearly indicated disbelief in the attorney's testimony which had a particularly devastating effect on the crucial issue of defendant's good-faith reliance on counsel. The charge should never have been given at that time; the amount of damage that it did to the appellant's defense was incalcuable. Other than the appellant himself, this attorney was his single most

important witness. Destroying the credibility of the witness in the fashion done by the Court made it almost impossible for the appellant to present a "good faith reliance" defense.

The Court, additionally, by omission, demonstrated partiality against appellant by failing to allow proper cross-examination of witness Quinn with respect to her identification of appellant.

In fact, the proper produce would have been for the Court to order an immediate Wade, supra hearing to determine if the identification had been tainted by a former photographic identification. Such failure surely constitutes basis for appeal on its own, under the Plain Error Doctrine, preserving the constitutional issue for appellate review before this Court.

In short, the Court's comments and rulings worked to prejudice appellant throughout and most particularly with regard to what amounts to the veritable destruction of the credibility of witness Gore, crucial to the appellant's defense.

POINT IV

THE COURT'S INSTRUCTIONS TO THE JURY FAILED TO FAIRLY REFLECT APPELLANT'S THEORY OF DEFENSE

Appellant's theory of defense at trial was a good faith belief in the venture undertaken by Perthshire. The basis of his honest belief rested upon reliance on the advice of counsel (pp 21-22,25 supra), reliance on his more experienced associates Silver and Pepperman (pp 17,20 supra), and on Perthshire's supplier of Scotch Whiskey, Henry Ost (p. 24, supra). Good faith is a complete defense to a charge of mail fraud. Durland v. U.S., ~~161 U.S. 306,~~ 65 F. 408 16 S. Ct. 508, 40 L. Ed 709 (189~~6~~).

Viewing the charge in its entirety as appellant must (U.S. v. Tortorello, 480 F.2d 764, Cert. Den. 94 S.Ct. 63, 414 U.S. 866, 38 L.Ed.2d 86 (1973) and U.S. v. Andreadis, 366 F.2d 423, cert. den. 87 S. Ct. 703, 385 U.S. 1001, 17 L.Ed 2d 541 (1966)), it is evident that the trial court failed to give adequate definition and emphasis to appellant's theory of defense.

The Court's references to good faith are brief, fleeting asides in which the phrase either is buried in a subordinate clause (1140) or defined in terms of its absence (1142).

"What is important and determinative of appellan[t's] appeal on this issue...is whether the record evidences a substantive presentation of the defense of good faith to the jury."

New England Enterprises, Inc. v. U.S. 400 F.2d 58, cert. den. 89 S.Ct. 6st, 393 U.S.1036, 21 L.Ed.2d 581 (1968).

Counsel's objections to the trial court's instructions were noted for the record (1154-5). A review of the entire charge necessarily embraces a finding of whether the "essential ingredients" of the defense were sufficiently presented to the jury even absent specific objection by counsel. U.S. V. Hutul, 416 F.2d 607, cert. den. 396 U.S.1007, 24 L.Ed 2d. 499, 90 S. Ct. 562, cert. den. 396 U.S.1012, 24 L.Ed. 2d 504, 90 St.Ct. 573, reh. den. 397 U.S. 1081, 25 L.Ed 2d 820, 90 S.Ct. 1519, cert. den. 396 U.S.1024, 24 L.Ed.2d 517, 90 St.Ct. 599 (1969) 7th Cir.

Appellant's requests to charge on the issue of good faith and elements of the charge ancillary thereto (for example, Requests Nos. 18-24) were not implemented by the court, and the charge generally reflects a rejection of the substance requests in toto. Such disregard puts the Court at the peril of having "forgotten something substantial." U.S. v. Cohen 145 F.2d 82 (2nd Cir. 1944).

The Court's instrictions on "reckless indifference" constituting a basis for a finding of guilt was perhaps unfortunate [because it] has been so often used as the equivalent of an absence of belief...[I]t has led to some confusion between no belief whatever and unreasonable credibility. Knickerbocker Merchandizing Co. v. U.S., supra, 13 F.2d at 546.

The Court minimized appellant's Request No. 24, thereby detracting from the defendant's justifiable reliance on commercial practice. "Some reasonable latitude is permissible when one extols the merits of one's product or engages in a certain degree of 'puffing' or 'salesmanship to sell one's product." U.S. v. Sheiner, 373 F.Supp.977 (S.D.N.Y. 1967).

Request to Charge No. 20 was also denied, similarly depriving appellant of an adequate institution on good faith. Sparrow v. U.S., 402 F.2d 826 (10th Cir. 1968).

A crucial defect in the jury instructions regarded the charge on appellant's reliance on his attorney. Counsel's Request to Charge No. 32 sought an instruction with respect to the advice of a "reputable attorney." Given the treatment of Witness Gore by the Court (See Point III) appellant was entitled to an additional instruction stating the presumed competence of such an attorney and his lack of interest in the case. Se 70 Yale L.J. 978, 983, 984 (1961).

The Court generally dwelt upon elements the Government was not bound to prove (113-36, 1138, 1146-48), unequivocably indicated that "prosecutions have not been instituted" against Silver and Pepperman (1120), referred to appellant's "various misrepresentations (1136), and chose to comment specifically with regard to solely appellant's interest in testifying at the trial (1151).

A further error in the charge lay in the weight of the Court's reminder that admonitions to counsel during the trial

should be disregarded but only glanced upon the role of the Court.

In this case where there was a substantial lack of "hard evidence" with regard to the appellant's devising and/or participating in the running of the business, let alone scheme; where the government witness Antonucci vacillated and ultimately conceded that she had received instructions from others in the operation of Perthshire's business and that she herself knew the business without any instruction from appellant; and where appellant was absent from New York during a substantial period that the business was being conducted, he was clearly entitled to the charges requested on the question of good faith rather than those given. The problem is compounded by the massive amounts of literature introduced which painted the Scotch whiskey industry in a favorable light. It is conceivable, as was in fact the case, that appellant had a good faith belief in what he did. He testified to that good faith belief. He was entitled to an adequate charge thereon.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the indictment dismissed.

Respectfully submitted,

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REQUEST NO. 18

The crime charged in this case requires proof of specific intent to devise a scheme to defraud before the defendant can be convicted. Specific intent, as the term implies, means more than a general intent to commit the act. To establish specific intent, the Government must prove beyond a reasonable doubt. that the defendant knowingly did the act that the law prohibits, purposely tending to violate the law and with an evil motive. The phrase, "intent to defraud", used in the crime charged is that the act was done knowingly, for the specific purpose of deceiving, in order to cause financial loss to another or financial gain to oneself. If the defendant had no real intention of devising a scheme to defraud which would cheat anyone out of anything, or if the Government has not proved, beyond a reasonable doubt that the defendant had the intention of cheating anyone, there is no intent to defraud and the defendant must be acquited.

Adapted and modified from United States V. Bessesen, 445 F.2d 463.

REQUEST NO. 19

The defendant's theory in this case is two fold. First, the defendant argues that there was never any scheme to defraud. If the Government has failed to prove a scheme to defraud, beyond a reasonable doubt, then you must acquit the defendant. Defendant further contends that not only was there no scheme to defraud, but that the statements allegedly made were not false, fraudulent and misleading. If you find that the statements were not false, fraudulent or misleading, or that the Government has failed to prove beyond a reasonable doubt, that the statements were false, fraudulent and misleading, then you must acquit the defendant. Moreover, the mere fact that the statements may have been false, fraudulent or misleading, is not in and of itself, enough to convict this defendant of the crime charged unless the Government has proved, beyond a reasonable doubt, that the statements were made pursuant to a scheme to defraud, which was devised by this defendant. Defendant contends that he did not devise any scheme to defraud and unless the Government has proved, beyond a reasonable doubt, that this defendant devised a scheme to defraud, you must acquit the defendant.

Defendant also submits the theory, which I submit to you is not inconsistent with the first theory submitted and this, as well, requires your earnest consideration, that if there was a scheme to defraud, this defendant had no knowledge of that scheme to defraud and that this defendant was acting in good faith in conducting his operations and functions within the company. If you find that the Government has failed to prove beyond a reasonable doubt that this defendant had knowledge of the scheme to defraud, or alternatively, that the Government has failed to prove beyond a reasonable doubt, that the defendant knew that any of the statements being made were false, fraudulent or misleading, or, additionally, if the Government has failed to prove beyond a reasonable doubt that the defendant made the statements, then you must acquit the defendant.

However, you the jury must be advised, and I now charge you, that the guilt of the defendant is personal and that assuming false represention were made as alleged, and even assuming that a scheme to defraud existed, this defendant cannot be convicted merely because he was an officer of the corporation. The declarations or statements made by others cannot be considered against him unless and

until it has been shown by the Government, beyond a reasonable doubt, that he was knowingly and intentionally participating in an enterprise the object of which he, individually, knew was to defraud and that if he, considering all of the circumstances, honestly and reasonably believed that the representations made were true, or if he did not, in good faith, know that the representations being made were false, there was an absence of the requisite criminal intent and the accused must therefore be acquited.

Adapted and modified McHale v. United States, 398 F.2d 757, Cert. denied, 89 S.Ct. 468; Browning v. United States, 35 F.2d 454.

REQUEST NO. 20

Assuming that you find that the defendant did make certain of the statements, or knew, or should have known that the statements were being made, before you can find the defendant guilty, you must find and believe, beyond a reasonable doubt, that he intentionally devised a scheme intended to defraud the purchasers of the scotch whiskey. It is not, and I emphasize not, sufficient that the Government establish that such investors lost money in the purchase of the whiskey, nor is it sufficient that the Government prove that the price charged for the whiskey was a higher price than such whiskey could be purchased elsewhere unless you are satisfied, beyond a reasonable doubt, that the defendant intended that such misrepresentations should be made and were made pursuant to a scheme devised by this defendant for the purpose of defrauding such purchasers of whiskey. You are further instructed that good faith and honest purpose on the part of the defendant is an absolute defense as to this charge. It matters not how visionary you may find the

statements to be, nor how unreasonable the prospects of success or profit from the resale of such Scotch whiskey referred to in the evidence may seem to you. If the defendant believed in them and the promises were made in good faith, whether they be glittering or attractive or not, they are not criminal. If therefore, you retain a reasonable doubt upon the question that the represention made by the defendant, no matter how glittering, attractive, persuasive, and alluring were made in good faith, and not as a part of a diliberate plan or scheme to defraud or obtain money by false pretenses, devised by this defendant, then it is your duty to find the defendant not guilty on every count in the indictment.

Hawley v. United States, 133 F.2d 966; Sparrow v. United States, 402 F.2d 826; Steiger v. United States, 373 F.2d 133; U.S. v. Beitscher, 467 F.2d 269; United States v. Diamond, 430 F.2d 688.

REQUEST NO. 21

There has been substantial evidence submitted by the prosecution relating to the acts, declarations and conduct of persons other than the defendant, in which the defendant had no part except upon a theory that he was the President of the corporation. However, you the jury, should be advised that guilt is personal and that assuming false representations were made as alleged, defendant cannot be convicted merely because he was an officer of the corporation and the declarations or statements made by others cannot be considered against the unless and until it is shown, beyond a reasonable doubt, that he devised a scheme, the object of which he knew was to defraud and that if, considering all the circumstances, he honestly and reasonably believed the representations to be true, there was an absence of the requisite criminal intent and the accused must therefore be acquited.

Adapted and modiifed from Browning v. United States, 35 F.2d 454.

REQUEST NO. 22

In the present case the Government has presented evidence as to statements made in the absence of the defendant. Before you may consider any of this evidence as to this defendant, you must first find the Government has, by evidence apart from such statement, established beyond a reasonable doubt (1) that this defendant or the persons who made the statements, had knowingly and intentionally participated in devising the scheme described in the indictment; (2) that the statement or statements were made pursuant to such scheme and in furtherance, thereof, with the knowledge, authorization and approval of the defendant.

If the Government, in regard to this defendant, has established both of these facts you may consider such evidence in passing upon the guilt of this defendant. Give it such weight as you feel it is justly entitled to, bearing in mind that the defendant did not make the statement.

If the Government has not established both (1) and (2) above, then you should reject all of such statements and give them no consideration in passing upon the guilt of this defendant.

Adapted and modified from Reisteroff v. United States, 258 F.2d 379; Cert. denied 79 S.Ct. 313, 358 U.S.927; Rehearing denied, 80 S.Ct. 42, 361 U.S.856.

REQUEST NO. 23

The Government has introduced evidence into this case that defendant knew that fictitous names were being signed to documents disseminated by a corporation of which defendant was President. The fact that the defendant had knowledge of the signing of the names of fictitous persons to documents disseminated by the corporation of which the defendant was President, should not be considered a circumstance of guilt if it was not proved, beyond a reasonable doubt that the persons who purchased the scotch whiskey were induced to purchase the whiskey as a result of the fictitous name.

Adapted and modified from Richardson v. United States, 158 F.2d 58.

REQUEST NO. 24

A scheme to defraud is not necessarily to be inferred from business adversity or unprofitable ventures. (Gold v. United States, 35 F.2d 16) Puffing, exaggerating, enthusiasm, and high pressure salesmanship does not constitute legal fraud. This is also true as to unfulfilled promises, prophesies, predictions and erroneous conjecture as to future events particularly where some relate to prospective profits from business operations. Defendant claims that he did not engage in any oral salesmanship, but even if you find that he did, the fact that the defendant had engaged in puffing, enthusiasm or high pressure salesmanship overstatements, consisting of mere estimates or prophesies as to which a person having more optimism that judgment, more faith than skepticism, might well entertain, if you find that defendant had a real and sincere belief in their truth and honesty this entitles the accused to be acquited.

Adapted from Scott v. United States, 263 F.2d 398; Farwell v. Colonial & Trust Co., 347 F. 480; Crosby v. Emerson, 42, F.713; Telex, Inc. v. Schaeffer, 233 F.2d 259.

ADMISSION OF SERVICE

The undersigned acknowledges receipt of a copy of the within

on *19*

at *o'clock* *M.*

.....

Attorney(s) for

by: .....

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK

Cathie Weitekamp *being sworn, says: I am not a party to this action; I am over 18 years of age; I reside at* Queens, N.Y.

On January 9, *1976 I served the within* DEFENDANT-APPELLANT'S BRIEF *upon* PAUL J. CURRAN, by: ROBERT HEMLEY, ESQ.

the attorney(s) for U.S.A. *in this action, at* 2 St. Andrews Plaza New York, N.Y. *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.*

Cathie Weitekamp

Type or Print Name Below Signature

Cathie Wietekamp

Sworn to before me

this 9th *day of* January, *19*76.

OF NEW YORK, COUNTY OF *ss.:* ***AFFIRMATION BY ATTORNEY***

The undersigned, an attorney admitted to practice in the State of New York, affirms: That the undersigned is the attorney(s) of record for

ithin action; that the undersigned has read the foregoing

ws the contents thereof; that the same are true to affirmant's own knowledge, except as to the matters therein be alleged on information and belief; and as to those matters affirmant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by

The grounds of affirmant's belief as to all matters not stated to be upon affirmant's knowledge, are as follows:

The undersigned affirms that the foregoing statements are true, under the penalty of perjury.

19 .....

Type or Print Name Below Signature